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In the Supreme Court of the United States

BURLINGTON NORTHERN
SANTA FE RAILWAY CO.,

Petitioner,

v.

SHEILA WHITE,

Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF *AMICUS CURIAE* THE ASSOCIATION OF AMERICAN RAILROADS IN SUPPORT OF PETITIONER BURLINGTON NORTHERN SANTA FE RAILWAY CO.

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QUESTION PRESENTED

Whether an employer may be held liable under section 704 of the Civil Rights Act of 1964 for assigning an employee duties within her job description, or for a temporary suspension rescinded with full back pay after the employer completed an investigation.

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INTEREST OF *AMICUS CURIAE*[1]

The Association of American Railroads ("AAR") is an incorporated, nonprofit trade organization representing the Nation's major freight railroads and Amtrak. AAR's freight

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[1] Pursuant to Rule 37.6 of the Rules of this Court, the Association of American Railroads states that no counsel for a party has authored this brief, in whole or in part, and that no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. Letters have been filed with the Clerk of the Court confirming that all parties have consented to the submission of this brief.

members operate approximately 77% of the rail industry's line haul mileage, produce 95% of its freight revenues, and employ 93% of rail employees. In matters of significant interest to its members, AAR frequently appears before Congress, administrative agencies, and the courts on behalf of the railroad industry. AAR believes that its familiarity with the railroad industry, and with the likely consequences of the Sixth Circuit's decision in this case, will aid this Court's understanding of the issues presented here.

The establishment of clear guidance on the scope of federal employment discrimination law is of substantial concern to AAR's members. Because railroad operations are by their nature decentralized and widely dispersed, AAR's members must rely on their supervisory personnel to oversee more than 180,000 rail employees and to ensure the safe and efficient operation of the Nation's railroads in the first instance. The Sixth Circuit's holdings below adversely affect the ability of AAR's members to vest that critical discretion in their supervisory personnel.

SUMMARY OF ARGUMENT

This Court explained in *Burlington Indus. Inc. v. Ellerth*, 524 U.S. 742, 761 (1998), that an employer can be held vicariously liable for harassment by supervisory personnel that produces "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Ellerth*'s reliance on the materiality of the challenged conduct should also guide this Court's resolution of the conflict in the lower courts over the threshold for actionable employer retaliation under Title VII. A supervisor's instruction to an employee to perform one set of tasks concededly within her job description, rather than a different set of tasks she preferred and had become accustomed to performing, is not a "tangible" adverse employment action.

This Court should also hold that an interim suspension that is subsequently vacated, with backpay, through the normal operation of an employer's internal decision-making process is not a "tangible" adverse employment action, especially where, as here, the parties understood that the employer would not render a final, official decision until after it concluded an investigation (or until the time for investigation had passed). Allowing employers a reasonable opportunity to perform such investigations or to "cure" otherwise-adverse actions would further Title VII's goal of fostering conciliation rather than litigation and encourage employers to adopt rigorous procedures for reviewing supervisory decisions.

Large interstate employers need clear and sensible rules in this area of the law so that they can strike an appropriate balance between the need to vest reasonable discretion and authority in front-line supervisors and the need to protect the company from costly employment litigation. The decentralized and widely dispersed nature of rail operations and the possibility of catastrophic accidents mean that railroads have a particularly strong need to delegate effective and immediate supervisory discretion to supervisors in the field. The Sixth Circuit's decision in this case makes it difficult and risky for a railroad to permit its supervisors to exercise ordinary supervisory authority over any employee who has ever complained about discrimination. That is not consistent with the goal of efficient and safe operation of the Nation's railroads.

ARGUMENT

I. THE SIXTH CIRCUIT SET TOO LOW A THRESHOLD FOR ACTIONABLE EMPLOYER "RETALIATION" UNDER TITLE VII

The standard for determining what kinds of employer decisions are sufficiently material and final to constitute an "adverse employment action" for purposes of a federal retaliation lawsuit is critically important to employers when

deciding how much authority supervisors can be permitted to exercise over employees who have previously made a discrimination complaint. If that threshold is set too low, or if even interim decisions can trigger a Title VII lawsuit even if they are later corrected through the normal operation of an employer's internal decision-making process, companies will have a strong incentive to require that any changes or disciplinary actions be approved by management or entrusted to a formal disciplinary process in the first instance. This case presents this Court the opportunity to resolve confusion in the lower courts over where that bar should be set.

The Sixth Circuit in this case set the bar far too low. In holding that a supervisor's direction to an employee to concentrate on performing tasks concededly within her job description, instead of other tasks she had become accustomed to performing, was an "adverse employment action" for purposes of a federal retaliation lawsuit, the Sixth Circuit failed to follow this Court's teachings in *Ellerth*. In holding that a supervisor's decision temporarily to suspend an employee for disciplinary reasons is an "adverse employment action"—even if the company declines officially to adopt the suspension and reinstates the employee with full backpay (and no interruption of benefits) after conducting an investigation—the Sixth Circuit failed to accord due weight to Title VII's goal of fostering conciliation rather than litigation. The Sixth Circuit's decision should be reversed.

A. Directing Employees To Perform Tasks They Were Hired To Do Is Not A "Tangible Employment Action"

In determining when an employer vicariously "discriminates" as a matter of law under Section 703(a) of Title VII, this Court in *Ellerth* "import[ed] the concept of a tangible employment action" from lower-court cases that it viewed as reflecting the prevailing understanding of the types of employer actions that constitute "adverse

employment actions." *Id.* at 761, 768 (citing *Crady v. Liberty Nat'l Bank & Trust Co. of Ind.*, 993 F.2d 132, 136 (7th Cir. 1993); *Flaherty v. Gas Research Inst.*, 31 F.3d 451, 456 (7th Cir. 1994); *Kocsis v. Multi-Care Mgmt., Inc.*, 97 F.3d 876, 887 (6th Cir. 1996); *Harlston v. McDonnell Douglas Corp.*, 37 F.3d 379, 382 (8th Cir. 1994)).[2] This Court explained that "[t]angible employment actions are the means by which the supervisor brings the official power of the enterprise to bear on subordinates," that "[a] tangible employment decision requires an official act of the enterprise, a company act," and that an employer should be held liable for tangible employment actions because in taking such actions "[t]he supervisor often must obtain the imprimatur of the enterprise and use its internal processes." *Id.* at 762. This Court therefore held that an employer is only liable as a matter of law for supervisor harassment that "constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Id.* at 761.

Ellerth accordingly makes clear that not all supervisory actions are sufficiently adverse to constitute actionable employer "discrimination" under Title VII; instead, a plaintiff must allege some genuinely *concrete and material* adverse change in the terms of employment—a "tangible employment action"—in order to hold the employer liable as a matter of law.[3] This principle, which this Court recently

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[2] The lower courts are in agreement that in order to prove unlawful retaliation, a plaintiff must demonstrate (i) that she engaged in conduct protected by Section 704(a); (ii) that the employer took an "adverse employment action" against the plaintiff; and (iii) that the protected conduct was causally connected to adverse action, although some courts, echoing *Ellerth*'s language, "use the term 'tangible employment action' or some other variation for the same concept" set forth in the second requirement. Pet. App. at 10a n.1.

[3] This Court added that where the supervisor's conduct does not result in a "tangible employment action," the employee must allege a hostile work environment that is objectively "severe or pervasive" to

reaffirmed in *Pennsylvania State Police v. Suders*, 542 U.S. 129, 144–45 (2004), should control this case as well. Both Sections 703(a) and 704(a) of Title VII, read *in pari materia*, prohibit employer "discrimination" as an "unlawful employment practice." 42 U.S.C. §§ 2000e-2(a), 3(a). Because "'Congress has not expressed a stronger preference for preventing retaliation under [Section 704(a)] than for preventing actual discrimination under [Section 703(a)],'" *Von Gunten v. Maryland*, 243 F.3d 858, 863 n.1 (4th Cir. 2001) (citation omitted), what constitutes actionable "discrimination" should be the same with the latter as it is with the former. Employers should be held liable as a matter of law for allegedly retaliatory actions taken by supervisors only when the action results in a genuinely concrete and material change in the terms and conditions of employment—a "tangible employment action."[4] The Sixth Circuit's decision in this case cannot withstand scrutiny under a reasonable application of this principle.

The Sixth Circuit's holding that an employer risks Title VII liability by instructing an employee to perform tasks concededly within her job responsibilities cannot be squared with *Ellerth*'s teaching that a "tangible employment action" constitutes "a *significant change in employment status*, such as hiring, firing, failing to promote, *reassignment with*

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constitute a constructive alteration of the terms and conditions of employment, and the employer may assert an affirmative defense to liability or damages that (i) it "exercised reasonable care to prevent and correct promptly any sexually harassing behavior" and (ii) that the employee "unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." *Ellerth*, 524 U.S. at 765. This case does not present the question whether an employer may be held vicariously liable for retaliatory harassment not resulting in a "tangible employment action." *See* Pet. App. at 10a n.1.

[4] Indeed, the Sixth Circuit itself acknowledges the relevance of *Ellerth*'s teachings, noting that "[t]he terms 'tangible employment action' and 'adverse employment action' are interchangeable." *Keeton v. Flying J, Inc.*, 429 F.3d 259, 263 n.1 (6th Cir. 2005).

significantly different responsibilities, or a decision causing a significant change in benefits." 524 U.S. at 761 (emphases added); *see also Suders*, 542 U.S. at 134 (a tangible employment action is "an employer-sanctioned adverse action *officially changing her employment status* or situation") (emphasis added). The rail supervisor's instruction to Respondent to focus on particular tasks that she was hired to perform, that she was already performing for a substantial part of the work day, and that were being performed by some of her more senior coworkers, was clearly nothing more than a task reassignment unaccompanied by any change in salary, hours, job category, or other term of her employment. *See* Joint Appendix ("JA") 58–61. Indeed, it is difficult to conceive how directing an employee to do what she was hired to do can amount to *any change*—let alone a "significant" one—to her employment status. As the Seventh Circuit has recognized, asking an employee to perform different *tasks* that are concededly within his or her current job classification cannot be an adverse change in the terms and conditions of his employment. *See Conley v. Vill. of Bedford Park*, 215 F.3d 703, 712 (7th Cir. 2000) (assigning maintenance employee to paint a pump room for an extended period of time was not an adverse employment action because "the assignment seems to be well within the scope of normal activities for a Village maintenance worker"). The bottom line, as the original Sixth Circuit panel correctly observed, is that:

> The railroad hired White as a track maintenance worker. One of her explicit job responsibilities was to maintain the railroad tracks. We fail to see how White suffered an adverse employment action by being directed to do a job duty for which Burlington Northern hired her.

Pet. App. at 96a. Directing an employee to do her job cannot be actionable retaliation, even if that employee has become accustomed to performing tasks she views as more desirable and to leaving the more onerous tasks to her

coworkers. That common-sense insight would have prevailed had the Sixth Circuit followed *Ellerth*'s teachings, and it should guide this Court's decision in this case.

Other federal courts of appeals have followed those teachings and have properly held, "[p]erhaps in recognition of the judicial micromanagement of business practices that would result if [courts] ruled otherwise," that "'changes in assignments or work-related duties do not ordinarily constitute adverse employment decisions if unaccompanied by a decrease in salary or work hour changes.'" *Brown v. Brody*, 199 F.3d 446, 452 (D.C. Cir. 1999) (citation omitted) (alteration in original); *see, e.g.*, *Crady*, 993 F.2d at 136 (alleged "demotion" did not constitute an adverse employment action, where the employee "would have maintained a management-level position at the same salary and benefits he was already receiving," and there was no showing that the employee's new responsibilities "were less significant than the responsibilities he previously enjoyed"); *Harlston*, 37 F.3d at 382 ("Changes in duties or working conditions that cause no materially significant disadvantage" are insufficient.); *Flaherty*, 31 F.3d at 456; *Brown*, 199 F.3d at 455–56.

These courts also have correctly held that "[m]ere idiosyncracies of personal preference are not sufficient to state an injury" under federal antidiscrimination laws. *Brown*, 199 F.3d at 457. Instead, consistent with *Ellerth*'s teachings, they have required a showing "that the plaintiff has suffered objectively tangible harm." *Id.* Thus, an employee's perception that a reassignment "was more stressful" was insufficient to show discrimination, when the employee "suffered no diminution in her title, salary, or benefits." *Harlston*, 37 F.3d at 382; *see also, e.g.*, *Flaherty*, 31 F.3d at 457 ("[A] plaintiff's perception that a lateral transfer would be personally humiliating is insufficient, absent other evidence, to establish a materially adverse employment action."); *Smart v. Ball State Univ.*, 89 F.3d 437, 441 (7th Cir. 1996) ("[N]ot everything that makes an employee unhappy is an actionable adverse action.").

These courts correctly recognize that Title VII was "not intended to diminish traditional management prerogatives," *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 259 (1981) (quotation omitted), and that requiring an employee to demonstrate an objectively material change in the terms of employment is necessary to ensure that employers and the courts are not inundated with federal lawsuits over trivial, day-to-day supervisory decisions. *See, e.g., Fairbrother v. Morrison*, 412 F.3d 39, 56–57 (2d Cir. 2005) (evaluation of "unsatisfactory" performance insufficient to show adverse employment action absent evidence that evaluation "negatively altered [the plaintiff's] compensation, benefits, or job title"); *Brown*, 199 F.3d at 458 (same); *cf. Bienkowski v. American Airlines, Inc.*, 851 F.2d 1503, 1507–08 (5th Cir. 1988) (admonishing that employment laws were "not intended to be a vehicle for judicial second-guessing of employment decisions, nor . . . to transform the courts into personnel managers").

They also recognize that the ordinary operation of a business requires flexibility for supervisors in assigning—and from employees in performing—tasks to meet ever-changing needs. An increase in ridership, for example, may require a passenger rail company to reassign its employees to busier terminals, or an airline to transfer flight attendants from empty flights to full flights. Such routine and necessary adjustments may render an employee's work subjectively more "undesirable" but cannot be treated as materially adverse employment actions—especially where, as here, the parties' *ex ante* expectation is that such adjustments are one of the realities of the employment relationship.

The Sixth Circuit's holding assigns undue importance to the subjective perceptions of employees regarding the desirability of particular tasks they are assigned to perform. Indeed, it is far from self-evident that a "dirtier" and more physically demanding task is inferior to a cleaner and less tasking one. Just ask park rangers whether they would prefer a desk job. *See, e.g., Ramirez v. City of San Antonio*,

312 F.3d 178, 180 (5th Cir. 2002) (employer allegedly discriminated "by transferring [the plaintiff] to a less physically demanding position"). The Sixth Circuit's decision promises to inundate the courts with litigation over trivial disputes and otherwise ordinary workplace interactions that should not be the subject of federal civil rights actions.[5] This will enmesh employers in lengthy and costly litigation, in which they will often be unable to obtain judgments as a matter of law prior to trial because the lawsuits will inevitably turn on factual disputes about the supervisor's motive. Plaintiffs can easily allege, and juries can easily conclude, that a discriminatory intent motivated some resented request by a supervisor whenever the employee had previously made a complaint about alleged discrimination. The Sixth Circuit's decision imposes unwarranted litigation burdens on companies for "trivial personnel action that an irritable, chip-on-the-shoulder employee did not like." *Williams v. Bristol-Myers Squibb Co.*, 85 F.3d 270, 274 (7th Cir. 1996).[6] And it effectively prevents employers from exercising even the most basic management prerogative over employees who have engaged in protected conduct. Title VII liability should not be premised solely on an employee's subjective dissatisfaction

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[5] Indeed, as the petition demonstrated, the number of retaliation charges filed with the Equal Employment Opportunity Commission doubled in the twelve years between 1992 and 2004. Pet. at 17 (citing EEOC, Charge Statistics FY 1992 Through FY 2004, *at* http://eeoc.gov/stats/charges.html (last modified Jan. 27, 2005)).

[6] Indeed, the Sixth Circuit's standard is hard to square with this Court's repeated holdings that sexual harassment does not alter the terms and conditions of employment unless it is sufficiently "severe" or "pervasive" to create an *objectively* "hostile or abusive work environment." *See, e.g., Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993). That standard was designed to identify workplace conduct that, although perhaps offensive, is not serious enough to justify federal litigation. If relentless sexual innuendo cannot be actionable as discrimination unless it renders the overall environment severely or pervasively hostile, it is not clear why much less harmful conduct should be actionable when it is alleged to be retaliatory.

with an employer's exercise of ordinary management prerogatives that did not result in any tangible detriment to the employee.

B. An Interim Suspension That Is Subsequently Corrected, With Backpay, Should Not Be Deemed A "Tangible Employment Action"

Respondent's supervisor temporarily suspended her without pay for alleged insubordination. Following the applicable collective bargaining agreement, the employer conducted an investigation at the employee's request and rendered a decision at the conclusion of the investigation. *See* Pet. App. at 6a–7a; Rule 91, Agreement Between St. Louis-San Francisco Railway Co. and its Employees represented by Brotherhood of Maintenance of Way Employees (eff. Aug. 1, 1978) ("BNSF CBA"), JA 56–57. That decision was to reverse the suspension, reinstate Respondent, and award full backpay for the 37 days she was suspended. The Sixth Circuit held that the employer could nevertheless be held liable under Title VII for the temporary suspension.

This Court recognized in *Ellerth* and its companion case, *Faragher v. City of Boca Raton*, 524 U.S. 775, 805–07 (1998), that the broad language of Title VII deliberately entrusts this Court with discretion to fashion sensible rules that "promote conciliation rather than litigation," *Ellerth*, 524 U.S. at 764, and encourage employers to pursue prophylactic measures that minimize the need for judicial intervention. Reversing the Sixth Circuit's holding, declaring that decisions that are clearly preliminary and tentative under an employer's internal processes should not constitute actionable retaliation, and allowing employers a reasonable opportunity to cure otherwise-adverse employment actions under Title VII would further those goals.

The Sixth Circuit's holding that an employer cannot decide, after an appropriate investigation, whether to adopt or reverse a temporary suspension or reassignment

discourages internal efforts to identify and redress potential statutory violations without litigation. The Sixth Circuit correctly noted that an employee who is wrongly suspended and subsequently reinstated, with backpay, may nonetheless have suffered some inconvenience and expense. But that is a small price to pay for a rule that encourages employers to seek out and confess nascent errors, and saves all parties and the federal courts the burden of litigation. Indeed, the Sixth Circuit's holding perversely punishes employers for maintaining rigorous internal review procedures, because a full reinstatement with backpay will no doubt be interpreted by a subsequent jury as a concession that the initial suspension was unjustified—and hence presumptively discriminatory or retaliatory. At a minimum, plaintiffs can be expected to make that argument. No sensible policy is furthered by punishing an employer for acknowledging that, despite a supervisor's initial judgment that a suspension or reassignment was warranted at the time, that judgment was an overreaction and the employee should be fully reinstated.

At least three other circuits—the Ninth, Eleventh, and D.C. Circuits—recognize the need to encourage adoption of effective employer decision-making and review processes and have held that "[a]n employer may cure an adverse employment action . . . before that action is the subject of litigation." *Taylor v. Small*, 350 F.3d 1286, 1293 (D.C. Cir. 2003); *Brooks v. City of San Mateo*, 229 F.3d 917, 930 (9th Cir. 2000) ("Brooks refused to accept the review and appealed, but she abandoned her job while the appeal was pending. Because the evaluation could well have been changed on appeal, it was not sufficiently final to constitute an adverse employment action."); *Pennington v. City of Huntsville*, 261 F.3d 1262, 1267 (11th Cir. 2001) ("[T]he decision to reprimand or transfer an employee, if rescinded before the employee suffers tangible harm, is not an adverse employment action. But when an employee loses pay or an employment benefit from a delayed promotion, courts have held that the employment action is not adverse only when

the action is rescinded and backpay is awarded.") (citations omitted); *cf. Brown*, 199 F.3d at 458 (low evaluation not an adverse employment action because "such evaluations could be adjusted on appeal before a separate administrative branch," and "[a]lthough Brown clearly knew of this procedure, there is no evidence that she ever sought such an adjustment.").[7]

Thus, the D.C. Circuit held in *Taylor* that there was no adverse employment action resulting from an allegedly retaliatory performance rating the employee received, even though it had the effect of lowering the amount of the employee's bonus, because the employee's supervisor "corrected the evaluation and paid the proper bonus before [the employee] brought this suit." 350 F.3d at 1289–90, 1293–94. The plaintiff could not maintain her retaliation claim, the court held, because "there was no unremedied adverse employment action when the suit was filed." *Id.* at 1294. A contrary decision, the D.C. Circuit added, would frustrate an important goal of Title VII:

> Permitting employers the opportunity to correct workplace wrongs prior to litigation is the objective of the EEO process. If a plaintiff were permitted a right to sue even if his or her employer had corrected the grievance, there would be absolutely no incentive for employers to make adjustments for past conduct during the EEO process.

Id. (quotation omitted); *see also Brooks*, 229 F.3d at 930 ("'To rule otherwise would be to encourage litigation before the employer has an opportunity to correct through internal grievance procedures any wrong it may have committed.'")

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[7] The Fifth and Eighth Circuits also have held that interim decisions are not "ultimate [employment] decision[s]" and therefore do not constitute adverse employment actions. *See, e.g., Benningfield v. City of Houston*, 157 F.3d 369, 378 (5th Cir. 1998); *Okruhlik v. Univ. of Ark.*, 395 F.3d 872, 880–81 (8th Cir. 2005).

(quoting *Dobbs-Weinstein v. Vanderbilt Univ.*, 185 F.3d 542, 546 (6th Cir. 1999)).

The Sixth Circuit declined to follow these well-reasoned decisions. Yet, it is clear that the employee's suspension was not the final decision of the employer. Instead, it merely began an internal process—mutually adopted by the parties in this case—that ultimately required the employer to render a final decision about the employee. That decision was to vacate the employee's suspension and award backpay for time away from work. In the end, the employer's internal decision-making process was reasonable and worked exactly as Congress—and the parties—hoped, and Respondent suffered no adverse employment action at all.

The Sixth Circuit disagreed, relying on *International Union of Elec., Radio & Mach. Workers v. Robbins & Myers, Inc.*, 429 U.S. 229, 236 (1976), which held that the pendency of an internal grievance process did not toll the statute of limitations on a Title VII claim. *See* Pet. App. at 23a (citing). Its reliance was misplaced. First, this Court did not hold in *Robbins* that internal grievance procedures are irrelevant as a matter of law to determining when an adverse employment action occurs. (Indeed, because that case involved a termination, this Court had no occasion to decide how the pendency of an internal investigation affects preliminary decisions that fall short of termination.) Instead, this Court noted that the relevant statutory "occurrence" depends on the circumstances, including the parties' expectations and any contractual agreements that fix the occurrence of the triggering event. *See Robbins*, 429 U.S. at 234–35; *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 111 (2002) (characterizing *Robbins* as concluding that the discriminatory conduct occurred on "the date that the parties understood the termination to be final"). In that case, because there was "no indication that either party viewed the . . . discharge as anything other than 'final,'" this Court found no reason to adopt a later event as the relevant occurrence. *Robbins*, 429 U.S. at 235.

Moreover, this Court in *Delaware State College v. Ricks*, 449 U.S. 250 (1980), specifically took into account a university's process for reviewing and officially approving preliminary tenure recommendations in determining when the statute of limitations began to run. This Court affirmed the district court's determination that the limitations period began to run after the college's governing body "formally had voted to deny [the employee] tenure" and the employee was "officially notified" of the decision—more than one year after the college's tenure committee made the initial recommendation to deny tenure. *Ricks*, 449 U.S. at 261–62. "[I]n light of [an] unbroken array of negative decisions," this Court explained, "the District Court was justified in concluding that the College had established its *official position*—and made that position apparent to Ricks—no later than [that date]." *Id.* at 262 (emphasis added).[8]

Under the Sixth Circuit's rationale, however, the limitations period in *Ricks* would have started running much earlier, for even a preliminary recommendation against tenure would have constituted an adverse employment action. *See* Pet. App. at 21a n.7.[9] Yet it is clear in this case that the parties contemplated that the employer

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[8] This Court in *Ellerth* also made clear the critical part an employer's internal decision-making process plays in determining whether challenged conduct amounts to actionable discrimination attributable to the employer as a matter of law, explaining that a "tangible employment action" entails a decision that is sufficiently final that it can fairly be said to have been "an official act of the enterprise, a company act." 524 U.S. at 762; *see also Suders*, 542 U.S. at 134 (explaining *Ellerth*'s holding that employers are strictly liable for "employer-sanctioned adverse action officially changing [an employee's] employment status or situation, for example, a humiliating demotion, extreme cut in pay, or transfer to a position in which she would face unbearable working conditions").

[9] The Sixth Circuit's assertion that the "ultimate employment decision" test contravenes Title VII's goals of "'mak[ing] persons whole for injuries suffered on account of unlawful employment discrimination,'" Pet. App. at 22a–23a (citation omitted), simply assumes the question to be decided—whether an interim decision subsequently vacated constitutes "unlawful employment discrimination."

would not render a final, official decision on disciplinary actions until it completed an investigation. The collective bargaining agreement governing the parties' employment relationship expressly provides for an investigation of disciplinary actions, conducted at the employee's request, and requires that a "decision be rendered by the Carrier within 10 days after completion of the investigation." Rule 91(b)(5), BNSF CBA, JA 57.[10] It was the employee's reinstatement with backpay that constituted the final "decision . . . rendered by the Carrier," which was obviously not adverse to Respondent.

Second, the circumstances surrounding suspensions are fundamentally different from those associated with terminations. *Cf. Gilbert v. Homar*, 520 U.S. 924, 932 (1997) (recognizing the qualitative differences between terminations and suspensions without pay for purposes of a due process analysis and observing, "Unlike the employee . . . who faced *termination*, respondent faced only a *temporary suspension* without pay. So long as the suspended employee receives a sufficiently prompt postsuspension hearing, the lost income is relatively insubstantial (compared with termination), and fringe benefits such as health and life insurance are often not affected at all.") (emphases added). Administrative suspensions, unlike terminations, are by their nature temporary and merely allow employers to conduct investigations without further exposure to the alleged misconduct. Title VII should not be read to prevent employers from doing so, and this Court should reverse the Sixth Circuit's decision.

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[10] It is important to note that the agreement sets forth different procedures for general grievances and obtaining the employer's "decision" on disciplinary actions after an investigation (or after the time for investigation has expired). Only after the carrier renders a decision at the conclusion of an investigation may a "dissatisfied" employee "appeal" the employer's "decision" through the grievance process set forth in the agreement. Rule 91(b)(7), BNSF CBA, JA 57.

II. THE SIXTH CIRCUIT'S HOLDINGS DISCOURAGE ADOPTION OF EMPLOYMENT PRACTICES MOST CONSISTENT WITH THE SAFE AND EFFICIENT OPERATION OF THE NATION'S RAILROADS

The United States railroad industry consists of more than 650 railroads that operate over one million pieces of equipment.[11] Every day in the United States, passenger and freight trains travel more than 1.5 million miles over a network of over 233,000 miles of track.[12] While the federal government, through the Federal Railroad Administration ("FRA"), has the regulatory authority to ensure railroad safety, carriers are primarily responsible for maintaining the safe operation of the Nation's railroads on a day-to-day basis, particularly with respect to track maintenance and employee discipline. Thus, for example, federal regulations, among other things, require operators to (i) designate qualified persons to conduct track inspections;[13] (ii) adhere to a schedule in conducting track inspections;[14] (iii) appoint qualified inspectors to conduct safety inspections of freight cars;[15] (iv) prevent employees under the influence of alcohol or drugs from working on the rails;[16] and 5) remediate any

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[11] *Railroad Safety: Hearing Before the Subcomm. On Surface Transp. And Merchant Marine of the S. Comm. On Commerce, Science, and Transp.*, 107th Cong. 18 (2002) (hereinafter *Transportation Hearings*) (statement of Allan Rutter, Administrator, Federal Railroad Administration).

[12] Norman Y. Mineta, Secretary of Transportation, Remarks at the Rail Safety Action Plan Announcement in Columbia, South Carolina (May 16, 2005) (hereinafter *Mineta Remarks*) (transcript available at http://www.fra.dot.gov/us/content/1558).

[13] 49 C.F.R. § 213.7 (2005).

[14] *Id.* § 213.233.

[15] *Id.* §§ 215.11(a), 215.9.

[16] *Id.* § 219.105(a).

track out of compliance with federal safety standards.[17] As the then-Administrator of the FRA testified before a Senate subcommittee, "[t]he railroads . . . have the responsibility for compliance with the standards FRA sets and to perform the necessary inspections and tests to ensure that they do comply."[18]

The responsibilities of carriers in ensuring safety go beyond codified federal regulatory requirements. The FRA has recognized that "the Code of Federal Regulations is not the sole source of wisdom on safe practices; there are, in fact, safety problems not covered by existing rules that require a solution nonetheless."[19] In this regard, railroad operators pay particular attention to employee conduct, in light of the sobering reality that human error accounted for 38% of all accidents in the last five years and is the single largest cause of train accidents.[20] Railroad operators accordingly must adopt comprehensive policies and procedures in an effort to ensure that employees conduct themselves in a manner consistent with the safe operation of the railroads. These range from basic prohibitions (such as the prohibition on working while under the influence) to specialized instructions (such as the proper method of operating track signals). *See, e.g.*, BNSF Maintenance of Way Operating Rules §§ 1.5, 5.2 (eff. Oct. 31, 2004), *available at* http://www.bnsf.com/employees/safety/pdf/MW Safety2004.pdf.

In light of the decentralization and wide dispersion of their operations, railroads of necessity rely on their line supervisors to enforce these and the myriad other safety and operational rules applicable to the tens of thousands of rail employees in the first instance. *Cf. id.* § 1.13

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[17] *Id.* § 213.5(a).

[18] *Transportation Hearings*, *supra* note 11, at 18 (statement of Allan Rutter).

[19] *Id.*

[20] *Mineta Remarks*, *supra* note 12.

("Employees will report to and comply with instructions from supervisors who have the proper jurisdiction."). Supervisory personnel also must be charged with making judgment calls to address issues that are *not* covered by any statute or regulation, but may nevertheless be just as important to maintaining safety. Safety requires all rail employees, especially line supervisors, to act quickly and decisively to respond not only to clear emergencies, but also to situations that call for an exercise of judgment that, if handled incorrectly, may present a serious threat to the safety of the public and rail workers alike. A supervisor may, for example, be called to respond to circumstantial evidence of employee drug or alcohol abuse, and his or her decision may be based on nothing more than an assessment of an employee's appearance or demeanor. Or a supervisor may be required to draw a line between a difference in opinion and outright insubordination. In situations in which the slightest error in judgment may inadvertently lead to a deadly accident, a supervisor must retain the proper incentives to err on the side of safety.

Yet the rulings below seriously distort those incentives by exposing employers to compensatory as well as punitive damages for temporary safety measures even when subsequently corrected through the employer's internal processes. The risk is particularly acute in the context of retaliation claims. The standards the Sixth Circuit adopted would inevitably make employers reluctant to entrust discretion to supervisors, and will make supervisors reticent to exercise whatever authority they retain, especially with respect to an employee who is known to have engaged in activity arguably protected by Title VII. An employer reasonably may withhold from the supervisor the necessary authority temporarily to reassign or suspend *any* employee, when any perceived slight, or temporary decision, may result in Title VII liability—or at least involvement in costly and time-consuming litigation.

Both of the Sixth Circuit's holdings in this case accordingly undermine an employer's ability to vest

meaningful, immediate supervisory authority in its front-line supervisors, and hamper the ability of supervisors to respond to circumstances requiring immediate and decisive action. Yet in these circumstances only a swift reassignment or temporary suspension may avert a real threat to safety.[21] And even if a supervisor unfailingly errs on the side of safety, the result is that *every* exercise of supervisory judgment involving employees known to have engaged in protected activity will bring with it the possibility of a retaliation charge. That is a fundamentally unfair risk to place on employers that depend on supervisory personnel to make innumerable critical decisions every day.

It is no answer to suggest (as did the Sixth Circuit) that employers can simply suspend employees with pay to avoid Title VII liability. As a threshold matter, it is far from clear that such action would not be found to constitute an adverse employment action under the Sixth Circuit's rationale. In any event, this approach imposes an unfair and substantial economic burden on employers, who would have to continue paying every suspended employee (as well as the other employees filling in for them) but would not have the

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[21] The Sixth Circuit's holdings also jeopardize the ability of employers in other industries to entrust their front-line supervisors to make personnel decisions that have a direct effect on safety. Other common carriers—airlines, trucking companies, bus lines, and cruise ships—are all subject to extensive federal safety regulations, but are responsible for ensuring compliance with those standards. *See* 14 C.F.R. § 91.7(b) (2005) (stating that the pilot in command of an aircraft is responsible for determining whether an aircraft is airworthy); 49 C.F.R. § 396.3(a) (2005) (requiring motor carriers to "inspect, repair, and maintain" all vehicles subject to its control); *Id.* § 374.313(c) (requiring bus carriers to keep required items in working order); 33 C.F.R. § 95.050 (2005) (requiring marine employers to prevent intoxicated employees from assuming their duties). These employers in turn must rely on their supervisory personnel to ensure safe operations in the first instance. They must be able to entrust their supervisory employees with sufficient discretion to take action whenever necessary to ensure the safety of their employees and the public, and the Sixth Circuit's decision equally hampers their ability to do so.

practical ability to recover the money where, as in most cases, the suspension is upheld and the employee is eventually terminated.[22]

The Sixth Circuit's holding that decisions that are alleged to be retaliatory cannot subsequently be "cured" through the operation of the employer's internal processes also effectively requires prior management review of every personnel decision made by front line supervisors. But prior review of these decisions is simply not realistic or practical in the railroad context. With respect to the reassignment of individual employees to different tasks within their understood job responsibilities, the tasks of rail employees engaged in operations and maintenance are of necessity not static; the location, difficulty, physical demands, required technical skill, and other aspects of the individual tasks they may be expected to perform vary, depending on operational needs and the workforce management decisions of supervisors, on a day-to-day basis. Maintenance-of-way crews, for instance, may operate rail test cars, perform necessary defective rail changes, correct track geometry defects, or make emergency repairs caused by derailments or adverse weather conditions on any given day. *See Practical Guide To Railway Engineering* 36 (Am. Ry. Eng'g & Maint. Of Way Ass'n ed., 2d ed. 2003). Each of these jobs in turn may require individual members of the crew to perform a wide variety of different tasks, and railroads hire these employees to do just that.

The Sixth Circuit's overly rigid view of what constitutes a "reassignment," and the court's undue deference to the subjective desires of an employee to perform some, but not

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[22] *Cf. Homar*, 520 U.S. at 932 (rejecting due process challenge of state employee who was suspended without pay following his arrest on felony drug charges and noting, "We think . . . that the government does not have to give an employee charged with a felony a paid leave at taxpayer expense. If his services to the government are no longer useful once the felony charge has been filed, the Constitution does not require the government to bear the added expense of hiring a replacement while still paying him.").

all, of the tasks associated with her job, intrude upon the fundamental prerogative of supervisors to assign (and reassign) employees to meet operational needs. Under the Sixth Circuit's view, employees simply could file discrimination charges and be able to decline to perform duties that they subjectively dislike but that would otherwise be part of the universe of tasks the employer hired them to carry out. The Sixth Circuit's decision thus creates an incentive for employees to file discrimination charges in an effort to entrench themselves in choice positions or "cherry pick" the tasks they like best, and hinders the ability of employers to manage their workforce efficiently. Title VII was never intended to straightjacket employers, and this Court has admonished that no employee should be able to place himself "in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing," *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 285 (1977). The Sixth Circuit's decision constitutes an unwarranted extension of Title VII and an impermissible intrusion into the employment relationship that, in the rail context, could reduce public safety.

CONCLUSION

For the foregoing reasons, *amicus curiae* The Association of American Railroads respectfully requests this Court to reverse the decision of the Sixth Circuit.

Respectfully submitted,

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